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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

RALPH L. SAMPSON ET AL.

ON CERTIFICATION OF APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO REMAND TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The United States District Court for the Northern District of Georgia dismissed 35 of 44 counts of an indictment charging mail fraud (18 U.S.C. 1341) and conspiracy, on the ground that they did not charge offenses under the laws of the United States (R. 68–72). The government, being of the opinion that the district court had misconstrued the indictment, appealed from the order of dismissal to the court of appeals under the Criminal Appeals Act, 18 U.S.C. 3731, *infra*. The court of appeals held that this Court has exclusive jurisdiction of the appeal because, in its opinion, the district court had "construed" a law of the United States (18 U.S.C. 1341) in dismissing the 35 counts. It accordingly certified the appeal to this

Court (R. 85–89). Appendix, *infra*, pp. 15–19. The government moves for remand of the cause to the court of appeals on the ground that the district court construed the indictment and the government's theory of prosecution embodied in the dismissed counts, and did not construe the mail fraud statute as such.

STATUTES INVOLVED

Section 1341 of Title 18 U.S.C. provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, * * * shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Section 3731 of Title 18 U.S.C. provides in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

An appeal may be taken by and on behalf of the United States from the district court to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

* * * * *

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

STATEMENT

1. A 44-count indictment returned in the District Court for the Northern District of Georgia charged the defendants, Lender's Service Corporation and 23 individuals, with using the mails in the execution of a scheme to defraud, in violation of 18 U.S.C. 1341, and with conspiracy to commit such offenses (R. 1–43).

The scheme charged in the indictment was, essentially, that the defendants, with no intention to perform the services promised, planned to obtain money from businessmen on the basis of false representations that the defendants maintained business organizations with specialized knowledge which would be able to assist the victims in the sale of their businesses or in the placement of loans. To this end, corporations were organized, salesmen hired and trained, and advertisements and other promotional material disseminated. In detail, the indictment alleged that each victim would be induced to sign a contract and pay an advance fee for such services, upon representations that the fee would be refunded if the application for services was not accepted at one of the regional offices of the defendants, but that, if the application was accepted and the fee kept, this meant that the application had been approved and that the promised services would be rendered. It was part of the scheme that defendants would accept all of the applications which were accompanied by checks for the advance fees and keep the fees without regard to the financial condition of the individual victim, his ability to obtain a loan from any source, or to sell his business. Following each such acceptance, there would be mailed to the victim a signed copy of the accepted application together with a form letter representing that the application had been accepted and that services would be performed. Thereafter, upon receipt of information from the victim, financial data would be compiled in a rudimentary form and documents would be sent to a few lending agencies without any attempt at correla-

tion between the type of loan sought and the type of loans handled by those lending agencies. For the purpose of further lulling the victims, letters would be sent advising of the sending of the reports in order to attempt to convince the victims that valuable services were being performed.

Each of the 43 substantive counts charged a separate mailing of "an envelope and contents" or portions of newspapers (counts 40 and 41) to a specified addressee for the purpose of executing the scheme.

2. On November 10, 1960, the defendants moved to dismiss all of the counts of the indictment on the ground that they failed to charge offenses against the laws of the United States (R. 44). Defendants also filed a motion for a bill of particulars. In opposing the motion to dismiss, the government filed a "supplemental brief" in the district court which that court treated as a bill of particulars (R. 46–59, 77).

In the supplemental brief, the government pointed out that the substantive counts of the indictment were predicated upon three types of mailings to the victims: (1) mailings of carbon copies of accepted "Financial Service Agreements" (the "contract mailings" involved in 34 of the dismissed counts); (2) mailings of brochures (7 counts); and (3) mailings of newspaper advertisements (2 counts). A copy of the "Financial Service Agreement" was appended to the brief (R. 60–62). It provided for payment of a fee upon signing the contract, and later payments, the final one to be made upon acceptance of a loan. It was also provided that the agreement was not cancellable after acceptance (R. 62). The contract authorized Lender's Service Corporation to send financial data to lending

institutions (R. 62). The form letter, accompanying the accepted agreement, requested the addressee to send enclosures to an accountant, bank, and two suppliers and to fill out a personal history form (R. 61). It stated that:

> As soon as all the enclosed material has been received by us, we will send you a proof copy of our Business and Financial Report for your approval.

The government in its brief also stated that "defendants allegedly had no intention of obtaining the loans sought by their victims, and might be said, therefore, to have had no intention of obtaining more money in the form of the other half of the split fee. But they did not tell the victims of this fact" (R. 47–48).

3. On March 2, 1961, the district court granted the motion to dismiss as to the 34 substantive counts based upon the "contract mailings" and the conspiracy count (count 44), and overruled the motion as to the nine counts based upon the mailings of brochures and newspaper advertisements (R. 66–72). The court quoted from the decisions of this Court in *Kann* v. *United States,* 323 U.S. 88, and *Parr* v. *United States,* 363 U.S. 370, that the mail fraud statute "does not purport to reach all frauds *but only those limited instances in which the use of the mails is a part of the execution of the fraud,* leaving all other cases to be dealt with by appropriate state law"; and that "only mailings which are 'a part of the execution of the fraud' or *'incident to an essential part of the scheme'* fall within the ban of the federal mail fraud statute" (emphasis in original) (R.

71–72). After denying the motion as to the nine counts, the court held (R. 72):

> It appears that the mailings involved in the remaining counts of the indictment relate to transactions where money had already been obtained from the victims prior to such mailings. This subsequent use of the mails under the holdings in the *Parr* and *Kann* cases, *supra*, and the case of *Getchell* v. *United States*, 5 Cir. 282 F. 2d 681, were not for the purpose of "executing" the scheme.[1]

ARGUMENT

It is settled that, if a dismissal of an indictment is predicated exclusively upon a construction of the statute upon which the indictment is founded, an appeal from the dismissal lies to this Court alone. If, on the other hand, the dismissal is predicated, even in part, upon a construction of the indictment, the appeal must go to the court of appeals. *United States* v. *Jones*, 345 U.S. 377 (discussed *infra*, pp. 10–12). In this case, the district court ruled that the dismissed counts failed to charge offenses because the mailings on which the counts were based occurred after the defendants had obtained from the particular victims to whom the mailings were addressed all the money which they expected to get from them. The court of appeals regarded this as a construction of the mail fraud

[1] On April 4, 1961, the court amended its order of March 2, 1961, and granted the defendants' motion for a bill of particulars as to the contents of the mailings. It referred to the fact that the material set forth in the government's brief had been treated as a bill of particulars by the court in its order of dismissal (R. 77).

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statute in that the district court interpreted the statute as not covering any mailing which occurs after a victim has parted with all the money a defrauder anticipates getting from him. This is unquestionably one aspect of the district court's decision, but it is not the only one. Where the court of appeals erred, we believe, was in failing to recognize that this ruling by the district court was based upon a preliminary interpretation of the indictment, an interpretation which the government challenges as erroneous. This latter question of interpretation, and with it all other questions involved in the appeal, are properly for determination by the court of appeals.

The initial error underlying the ruling of the district court was that it construed the indictment as charging a separate, terminable scheme as to each individual victim, with the result that the question whether a contract mailing was in execution of that scheme would have to be judged in the isolated context of the dealings between the defendants and the individual to whom the mailing was sent. In our view, that was not what the indictment charged. It alleged a general and continuing scheme to defraud a whole group of people by means of an elaborate structure involving the creation of corporations, the hiring and training of salesmen, and the use of extensive advertising material. None of this was discontinued or was expected to be discontinued the minute any particular victim was defrauded of his advance fee. The subsequent letter to each victim, as explained below in more detail, was essential to lulling him into a sense of security so that the on-going scheme of

deceiving numerous victims could be executed. In other words, the indictment charged, not merely isolated disconnected schemes aimed separately at separate individual victims, but a widespread, integrated, continuing fraudulent interprise, the aim and purpose of which was to defraud as many victims as could be duped by the defendants' fraudulent promises and representations. We think the district court erred in viewing the indictment as charging a scheme to defraud from the standpoint of each particular victim, rather than from the general over-all plan of the defendants. The proper approach, in our view, is to consider the full scheme set forth in the indictment, which obviously encompassed more than the defrauding of any particular individual. As alleged, the defendants intended to continue to perpetrate their fraudulent scheme upon one victim after another for as long as they were able to carry it on. The whole elaborate establishment was both designed and necessary to the accomplishment of this purpose.

It was this error in its understanding of the nature of the scheme alleged which led the district court to conclude that, on the face of the indictment, the scheme had reached fruition as to each victim when he paid the advance fee and that the later contract mailing was neither in fact nor in purpose calculated to further the scheme. This, as we have shown, is an erroneous interpretation of the indictment, as supplemented by the government's bill of particulars.[2] For

[2] For the purposes of the Criminal Appeals Act, the particulars are to be considered part of the indictment. See *United States* v. *Lem Moy*, 330 U.S. 724, 725; *United States* v. *Halseth*, 342 U.S. 277, 278–279.

each of these mailings consisted of more than the accepted contract previously signed by the victim when he paid the advance fee. With each such mailing, the victim received a letter asking him to send information which the defendants represented they would use to prepare a financial report to be sent to him for approval. It was further represented that the report would be used by the defendants in performing the services they had contracted to undertake. The district court's interpretation of the indictment overlooks the impact of this letter in the context of the over-all continuing scheme to defraud numerous victims and the allegations that the contract mailings were an integral part of the general scheme, calculated to lull the victims and thus, by concealing the defendants' fraudulent purpose, to enable them to perpetrate further frauds as part of their scheme.

Since these questions of the proper construction of the indictment must be settled first, before the issue of statutory interpretation is reached, the cause must be considered by the court of appeals under *United States* v. *Jones*, 345 U.S. 377 (which was not cited to or by the court of appeals). In *Jones*, a two-count information charged the defendant, a Florida prison official, with having whipped certain prisoners in order to extort confessions from them regarding violations of prison rules so that illegal and summary punishment could be imposed upon them in violation of specified rights guaranteed by the due process clause of the Fourteenth Amendment. In dismissing the information, the district court construed it as alleging that the whippings were administered for the

purpose of disciplining the prisoners for past bad conduct, and held that, so construed, the information did not charge federal offenses because the power of the states to regulate their internal affairs, including the running of their prisons, had never been surrendered to the federal government. See *United States* v. *Jones*, 108 F. Supp. 266 (S.D. Fla.). From this decision the United States appealed directly to this Court under 18 U.S.C. 3731, *supra*. The Court remanded the cause to the court of appeals on the ground that the decision of the district court depended upon a construction of the information which the government was attacking. The Court said (345 U.S. at 378):

> On appeal, the Government predicates its argument for reversal upon the assumption that the information charges far more than the District Court found it charged. The Government construes the information to charge that appellee wilfully extorted confessions of violations of prison rules from the prisoners and wilfully inflicted illegal summary punishment upon them, in violation of the laws of Florida and the Constitution of the United States. Thus, the Government's appeal—the theory of the prosecution—is based upon a construction of the information which differs significantly from the construction which the District Court has placed upon it.
>
> The Criminal Appeals Act, *supra*, strictly limits the scope of our jurisdiction over this appeal. We may only entertain questions relating to the construction of the Civil Rights Act, *supra*, and its applicability to this information. We cannot re-examine the information

> and construe it *de novo,* for we are bound by the District Court's construction. * * *

Just as the government construed the scope of the information in *Jones* to charge more than the district court found the information to charge, so in the instant case the government construes the indictment, as supplemented by the bill of particulars, to charge much more than the restricted interpretation given by the district court on the counts in question. And just as the district court in *Jones,* after its restrictive interpretation of the scope of the information, found that the information did not charge offenses under the laws of the United States, so the district court in the instant case, after its restrictive interpretation of the indictment, found that the dismissed counts did not charge offenses against the laws of the United States. Thus, the same considerations which led this Court to remand the *Jones* case to the court of appeals—an interpretation by the district court of the charges which was at variance with the government's theory of prosecution, and, as interpreted, the conclusion by the district court that the charges did not allege offenses against the laws of the United States—are present in the instant case.

The decision of this Court in *Jones* is, therefore, dispositive of this certified appeal, and the appeal should, as in *Jones,* be remanded to the court of appeals for a decision on the merits of the case.[3]

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[3] The cases relied upon by the court of appeals to indicate that the district court had interpreted a law of the United States and that, therefore, the appeal should properly be to the Supreme Court are inapposite. All of those cases involved clear-cut interpretations by the district court of the laws of the United States, and nothing more.

CONCLUSION

For the reasons stated, it is respectfully submitted that this case should be remanded to the court of appeals.

ARCHIBALD COX,
Solicitor General.

FEBRUARY 1962.

APPENDIX

In the United State Court of Appeals for the Fifth Circuit

No. 18900

UNITED STATES OF AMERICA, APPELLANT

v.

RALPH L. SAMPSON, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

(January 18, 1962)

Before TUTTLE, Chief Judge, and CAMERON and BROWN, Circuit Judges.

CAMERON, Circiut Judge: This appeal was taken by the United State of America from a judgment of the district court dismissing, for failure to state an offense, thirty-five counts of a forty-four count indictment against twenty-three individual defendants and one corporate defendant. The indictment was based upon 18 U.S.C. § 1341, charging that appellees had used the mails to defraud. Besides a motion to dismiss the appeal on the ground that the judgment appealed from was not a final judgment, the appellees filed an alternative motion challenging the jurisdiction of this Court and praying that we certify the appeal

to the Supreme Court of the United States on the contention that exclusive jurisdiction of the appeal was lodged in the Supreme Court. We think that this motion is well taken and that the Supreme Court does have exclusive jurisdiction to determine the appeal and, accordingly, we certify the appeal to that Court.

This action is taken pursuant to the terms of 18 U.S.C. § 3731, which provides in part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment * * * or any count thereof, where such decision or judgment is based upon the * * * construction of the statute upon which the indictment * * * is founded * * *
>
> If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

Decision of this point turns upon the determination of whether the court below dismissed any count of the indictment based upon its "construction" of the Mail Fraud Statute, supra. We think that it did. The following language is taken from the judgment of the district court:

> The purpose of Congress in enacting § 1341 was to prevent the Post Office from being used to carry out any scheme to defraud or to obtain money by false pretenses * * *. Thus only mailings which are "a part of the execution of the fraud" or "incident to an essential part of

> the scheme" fall within the ban of the federal mail fraud statute * * *
>
> It appears that the mailings involved in the remaining counts of the indictment relate to transactions where money had already been obtained from the victims prior to such mailings. This subsequent use of the mails * * * were not for the purpose of "executing" the scheme.

It seems clear that every word of the quoted language was used in the "construction" of the Mail Fraud Statute. The district court was declaring what the statute meant in its provision "for the purpose of executing such scheme or artifice * * *." It was holding that using the mail in connection with transactions where the money had already been obtained from the victims did not constitute an "executing" of the scheme. It had to determine from other cases and from its own construction of the statute itself whether the mailings charged in the several counts of the indictment amounted, under the law, to an "execution" of the scheme described in the indictment. As to the facts set forth in nine counts of the indictment, it held that the actions charged therein did constitute an execution of the scheme. As to the thirty-five counts here involved, it held that the actions set forth in the respective counts did not constitute an "execution" of the scheme.

The district court had to determine the meaning of the Act, particularly of the word "execution," and to assay the language of the several counts to determine whether the actions charged did constitute execution of the scheme under its construction of the meaning of the words used in the statute. The decision reached by it was clearly "based upon the * * * construction of the statute upon which the indictment * * * is founded."

In their briefs on the merits, the parties differed sharply on whether mailings made after money had already been obtained from the victims did constitute execution of the scheme within the meaning of the Mail Fraud Statute. Construction of the meaning of the statute was a *sine qua non* of a decision by the district court. That being true, the Supreme Court of the United States has exclusive jurisdiction of the appeal.[1]

Aside from any admission by the United States that the district court was here engaged in construction of the statute, we think that the Supreme Court cases relied upon by the movants amply sustain that view. *United States* v. *Borden Company,* 308 U.S. 188; *United States* v. *Mersky,* 361 U.S. 431, 434; *United States* v. *Hvass,* 355 U.S. 570; *United States* v. *Turley,* 352 U.S. 407; *United States* v. *Southeastern Underwriters Association,* 322 U.S. 533; *United States* v. *Halseth,* 342 U.S. 277; *United States* v. *Hood,* 343 U.S. 148; *United States* v. *Bramblett,* 348 U.S. 503; *United States* v. *Howard,* 352 U.S. 212; *United States* v. *International Union,* 352 U.S. 567.

In the recent case of *United States* v. *Mersky,* supra, the Supreme Court dealt at some length with

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[1] Movants quote at length from the brief of the United States on the merits in an effort to show that the brief admits that the court below construed the Mail Fraud Statute, notwithstanding that it used the word "misconception" instead of the word "misconstruction." Here is a part of the Government's brief which movants quote:

"In so ruling, the Court has adopted the position that even though a fraud scheme encompasses dealings with numerous victims and continues for a number of years, relying, as it must, for success upon the pacifying and lulling of past victims as well as the finding of new ones, that once a victim has parted with his money no further mailing by the fraud operators to him can possibly be a part of the *execution of the fraud. This ruling is based upon a misconception of the law of mail fraud.*" [Emphasis added.]

the addition to the statute of the right invoked by the movants here and used these words (361 U.S. p. 434) in defining the duty which we conceive is laid upon us here:

> * * * The Criminal Appeals Act specifies several conditions, any one of which permits a direct appeal by the Government to this Court, and makes our jurisdiction in such cases exclusive. In the event that an appeal which should have been taken here is erroneously effected to a Court of Appeals, that court is directed to certify it here.

We hold, accordingly, that the appeal was erroneously effected to this Court and it is ordered that it be and it is certified to the Supreme Court of the United States.

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